posthumous child damages for the wrongful killing of its father. See *The George and Richard*, L. R. 3 A. & E. 466; *cf. Quinlen* v. *Welch*, 69 Hun 584.

In view of the serious abuses which might result, the expediency of recognizing a legal right of the sort described is doubtful. On the difficult question of cause the mother may incline to romancing and the jury to superstition. *Gorman* v. *Budlong*, *supra*, shows an additional danger likely to be frequent. The child has died soon after birth. If it has suffered a tort an action by the next of kin, though perhaps not contemplated by the framers of Lord Campbell's Act, is strictly within its provisions; and substantial verdicts often undeserved may result. In many such cases recovery could be refused only on the ground that these abuses render it inexpedient to recognize at all the right of bodily integrity. Whether this ground should be taken, it is submitted, is the real question.

RECENT CASES.

ADMIRALTY — MASTER OF A DREDGE — LIEN FOR WAGES. — A libel for wages was filed against a dredge. The libellant was licensed as master, had full charge of the dredge, and performed the usual duties of a master except that he received no money for the owners. He also acted as engineer, fireman, and general deck hand. *Held*, that he was not a master within the rule that a master has no lien upon his vessel for wages. *The John McDermott*, 109 Fed. Rep. 90 (Dist. Ct., Conn.).

In England originally contracts of mariners for wages were not regarded as maritime contracts. See *De Lovio* v. *Boit*, 2 Gall. 398, 453. Therefore neither masters nor men could proceed in admiralty for their wages. When, later, seamen were allowed a lien enforceable in admiralty, the privilege was still denied to masters on the ground that they contracted with the ship-owner personally. *Clay* v. *Snelgrove*, Carth. 518. In the United States, likewise, a master has no lien. *Steamboat Orleans* v. *Phoebus*, 11 Pet. 175. His contract for wages, however, is regarded as maritime and within the admiralty jurisdiction. *Willard* v. *Dorr*, 3 Mason 91. Further, it has been held in this country that the fact of contracting directly with the owner does not prevent the acquisition of a lien. *The Carlotta*, 30 Fed. Rep. 378. Thus the principal reasons given in the English cases for denying the master a lien and for distinguishing between masters and seamen, have been swept away, while the distinction is retained. The courts have therefore shown a not unnatural tendency to limit the class of masters as narrowly as possible, and while the principal case lays down no satisfactory test, its result is hardly to be regretted. In England the distinction is now abolished by statute.

BANKRUPTCY — PREFERENCES — SURRENDER. — A creditor knowingly received a preference voidable under the Bankruptcy Act of 1898, § 60 *b*, and refused to give it up till compelled to do so under a judgment obtained by the trustee. *Held*, that he could not thereafter prove his claim against the bankrupt's estate. *In re Owings*, 109 Fed. Rep. 623 (Dist. Ct., W. D. Mo.).

The Bankruptcy Act of 1898 provides (§ 57 *g*) that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." There is yet little authority as to what constitutes a surrender under this provision, but the tendency seems to be toward the rule of the principal case. *In re Beiber*, 2 N. B. N. Rep. 943; see *In re Keller*, 3 N. B. N. Rep. 845; *contra*, *In re Baker*, 2 N. B. N. Rep. 195. It was well established under the analogous provision in the Bankrupty Act of 1867, § 23, that surrender meant a voluntary act of the creditor and did not include payment under judgment. *In re Richter's Estate*, 4 N. B. R., 2nd ed., 221; *In re Leland*, 9 N. B. R. 209. That interpretation of the word seems accurate, for when the transfer of the preference has been invalidated by the

court, the creditor has in legal contemplation nothing left to surrender. The result is equitable, for when a creditor has elected to resist the trustee, he should not stand on an equal footing with those over whom he has attempted to retain an illegal advantage.

BILLS AND NOTES — ALTERED CHECKS — FAILURE OF DEPOSITOR TO EXAMINE VOUCHERS. — The plaintiff's clerk altered checks drawn by the plaintiff on the defendant bank, and appropriated the proceeds above the original amount of the checks. It was his duty to examine the returned vouchers. The bank charged the plaintiff with the full amount of the checks and the fraud was undiscovered for about two years. The plaintiff sues for the difference between the amount of the checks as signed by him and as altered. *Held*, that he can recover. *Critten* v. *Chemical Nat. Bank*, 60 N. Y. App. Div. 241.

It seems to be generally considered in America that a depositor who fails to examine his vouchers within a reasonable time after their return, is precluded from disputing the right of the bank to charge him with the amount of altered checks. *First Nat. Bank* v. *Allen*, 100 Ala. 476; see also note, 27 L. R. A. 426. The principle seems to be estoppel by conduct. Some cases deny the estoppel when the examination of the vouchers has been intrusted by the depositor to the man who altered the check. *Hardy* v. *Chesapeake Bank*, 51 Md. 562; *Frank* v. *Chemical Nat. Bank*, 84 N. Y. 209. The better rule, however, makes no exception of such cases. *Leather, etc., Bank* v. *Morgan*, 117 U. S. 96; *Dana* v. *Nat. Bank of the Republic*, 132 Mass. 156. It rests upon the ground, not that the principal is affected with knowledge gained by the agent in perpetrating the fraud, but that the bank, by reason of its business relationship with the depositor, is entitled to rely upon the assumption that he has made the examination customary among prudent business men. Whether he does so personally or by agent does not concern the bank, and the negligence or fraud of the agent cannot excuse the principal. Cases of forged indorsement, sometimes cited as opposed to these principles, are not in point, since an examination of vouchers would not reveal the forgery. See *Shipman* v. *Bank of the State of New York*, 126 N. Y. 318. The result in the principal case, therefore, seems unsound.

CARRIERS — AGENCY — DELIVERY TO AN IMPOSTOR. — X, who lived in a town to which an express company did not run, instructed the company to deliver to the conductor of a railway train which ran to his town, all packages addressed to him. The railroad company was paid for the service. An impostor ordered goods in the name of X, and they were shipped in the usual way. The agent of the railroad offered the goods to X, who after examination refused to receive them. Later the impostor called for the package, claiming the same name as X and identifying himself by showing the express receipt. The agent of the railroad delivered the goods. Suit was brought by the consignor against X and the railroad company. *Held*, that both are liable for the value of the goods. *Bruhl* v. *Coleman*, 39 S. E. Rep. 481 (Ga.).

The decision holding X liable for the delivery to the impostor, is based on the ground that the railroad company, by virtue of its arrangement with X, received this package and dealt with it as his agent. It is submitted that this is error. The railroad company was not in his employ in the sense that it was bound by his orders. It was paid a fixed charge for its services, and was clearly in the position of a second carrier. Therefore when the supposed consignee refused the goods, his responsibility ceased. The question remains whether the carrier was properly held liable for misdelivery. The weight of authority both in this country and in England holds that after reasonable effort to find the consignee or after tender and refusal the carrier is bound only to use reasonable care and is not an insurer against misdelivery. *The Drew*, 15 Fed. Rep. 826; *Heugh* v. *London, etc., Ry. Co.*, L. R. 5 Ex. 51; *contra*, *Pacific Express Co.* v. *Shearer*, 160 Ill. 215; see also note, 37 L. R. A. 177. The prevailing view seems the sound one, and is apparently opposed to the decision in the principal case. It is therefore unnecessary to consider the difficult question of title in the goods. See 14 HARV. LAW REV. 60.

CONFLICT OF LAWS — RECOGNITION OF ACQUIRED RIGHTS — FOREIGN MARRIAGE. — A Russian Jew married his niece in Russia, where such marriage was lawful. Later he came to the United States and was naturalized. By the law of Pennsylvania such a marriage, if contracted there, would be void. *Held*, that the marriage will not be recognized in Pennsylvania, since a continuance of the relation would expose the parties to indictment. *United States ex rel. Devine* v. *Rodgers*, 109 Fed. Rep. 886 (Dist. Ct., E. D. Pa.).

In general where the *lex domicilii* coincides with the *lex loci contractus* in giving a person capacity to marry, the marriage contracted by him will everywhere be recognized as valid. *Sutton* v. *Warren*, 10 Met. 451. Nevertheless a marriage deemed incestuous by the general consent of Christendom will not be recognized. See STORY, CONFLICT OF LAWS, § 114. Such marriages, however, are those only which are in direct line of consanguinity, or between brother and sister. *Wightman* v. *Wightman*, 4 Johns. Ch. 343; *Stevenson* v. *Gray*, 17 B. Mon. 193. The court in the principal case makes a further exception of marriages which are incestuous by statute of the particular state in which recognition of the marriage is sought. The weight of authority in this country is to the contrary. *Stevenson* v. *Gray*, *supra* ; *Commonwealth* v. *Lane*, 113 Mass. 458. In England, there are *dicta* on both sides of the question. *Brook* v. *Brook*, 9 H. L. Cas. 193; *Fenton* v. *Livingstone*, 3 Macq. H. L. 497 ; *Sottomayor* v. *De Barros*, 3 P. D. 1. Since marriages between uncle and niece are permitted by many states, a rule like that contended for in the principal case might cause much hardship. Whether the parties shall be allowed to live together in violation of the criminal statutes is quite a different question.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — FRONT FOOT RULE. — An assessment for the paving of a street was levied on the abutting owners according to the "front foot rule." *Held*, that the assessment does not violate the Fourteenth Amendment. *Zehnder* v. *Barber, etc., Co.*, 108 Fed. Rep. 570 (Cir. Ct., Ky.). See NOTES, p. 307.

CONSTITUTIONAL LAW — LEGISLATIVE QUESTION — POPULATION OF COUNTIES. — County commissioners being about to issue bonds, the plaintiff asked for an injunction against them on the ground that the county at the time of its creation by statute had not the number of voters required by the constitution. *Held*, that the injunction will not issue, because the question whether the constitutional requirement as to population was satisfied is one exclusively of legislative cognizance. *Farquharson* v. *Yeargin*, 64 Pac. Rep. 717 (Wash.).

There is at least one contrary decision on exactly the same point. *Bridgenor* v. *Rogers*, 1 Cold. 259. Furthermore, there would seem to be no difference in principle between the application of a constitutional provision as to the population of counties and of a similar clause regarding area. This substantial identity being recognized, the weight of authority is strongly against the principal case. *McMillan* v. *Hannah*, 61 S. W. Rep. 1020. It is submitted, however, that the case represents the better doctrine. It is well settled that under our system many constitutional provisions raise questions on which the legislature or the executive is the final judge; and the courts must then accept the decision, which is as conclusive as those of the courts in cases of judicial cognizance. *Field* v. *Clark*, 143 U. S. 649; *Luther* v. *Borden*, 7 How. 1, 42. The line between legislative and judicial questions is not always easy to draw, but it would seem that the legislature is better constituted than the judiciary to decide questions like that in the principal case. Moreover no advantage is apparent from allowing judicial revision of the legislative action, which is not overbalanced by the obvious inconvenience resulting. Two previous decisions have been found in support of this view. *De Camp* v. *Eveland*, 19 Barb. 81 ; *Lusher* v. *Scites*, 4 W. Va. 11.

CONTRACTS — CONSIDERATION — FORBEARANCE OF A BONA FIDE CLAIM. — *Held*, that forbearance to prosecute a claim honestly made but not legally valid is no consideration for a promise. *Price* v. *First Nat. Bank*, 64 Pac. Rep. 639 (Kan.).

The rule here followed was repudiated in England by the case of *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449 (1870). In America some jurisdictions support the doctrine of the principal case. *Bates* v. *Sandy*, 27 Ill. App. 552. Yet the weight of authority inclines toward the English rule. *Prout* v. *Pittsfield Fire Dist.*, 154 Mass. 450. It would seem that detriment to the promisee is the scientific test of consideration. See LANG., SUM. CONT. § 45 *et seq.* But there are two theories as to the application of this test. One holds that detriment includes any act or forbearance given in exchange for a promise. See 12 HARV. LAW REV. 515 *et seq.* Under this view the principal case is clearly unsound. But the prevailing opinion seems to be that the act or forbearance must be one not required by previous legal obligation. See 8 HARV. LAW REV. 27 *et seq.* Regarding consideration from the standpoint of the parties at the time of the agreement, as the law seems properly to do, the second theory will not support the principal case; for one honestly believing his claim to be valid has a legal right to litigate it, and in forbearing, does what he was not legally bound to do. See,

however, LANG., SUM. CONT. §§ 56, 57. The principal case is further open to the practical objection that it discourages compromise.

CONTRACTS — CONSIDERATION — SUBSCRIPTION TO CHURCH FUND. — The defendant signed a subscription paper for the purchase of a church site, and the church afterward contracted for the land. *Held*, that the defendant's promise is supported by a valid consideration and enforceable. *First Church* v. *Pungs*, 86 N. W. Rep. 235 (Mich.). See NOTES, p. 312.

CONTRACTS — CONSIDERATION — SUCCESSIVE PROMISES OF THE SAME PERFORMANCE. — *Held*, that the promise of one party to an existing contract to perform his obligation under that contract, is not a valid consideration for a new promise by the other party. *Wescott* v. *Mitchell*, 50 Atl. Rep. 21 (Me.).

In this country there has been a long continued conflict in both opinion and judicial decision on the question raised by the principal case. Some courts have held the consideration valid and the contract good on the ground of an implied rescission of the former contract. *Goebel* v. *Linn*, 47 Mich. 489. This theory is applicable only when the first contract was bilateral, and moreover there is generally no evidence that the parties intended a rescission. Again the validity of the second contract has been defended on the theory that any promise given in exchange at the request of the other party is good consideration, and that there should be no attempt to determine the value of the promise. See 13 HARV. LAW REV. 29. It seems, however, the better view, and one supported by at least a balancing weight of authority, that the law will not regard as a detriment a promise to perform what one is already bound to the promisee to do. *Ayres* v. *Chicago, etc., R. R. Co.*, 52 Iowa 478; see 8 HARV. LAW REV. 27. The law in England seems to be settled in accord with this view. *Frazer* v. *Hatton*, 2 C. B. N. S. 510.

CONTRACTS — EXCUSE — REPUDIATION — ELECTION NOT TO TREAT AS BREACH. — *Held*, that when a contract of mutual obligation is repudiated by one party, and the other party has not elected to treat such repudiation as a breach, the latter is not excused from continuing to perform on his part. *Smith* v. *Georgia Loan, etc., Co.*, 39 S. E. Rep. 410 (Ga.). See NOTES, p. 306.

CONTRACTS — NOTE EXECUTED ON SUNDAY — SUBSEQUENT PROMISE. — A note was delivered on Sunday in payment of the difference on an exchange of personal property concluded on that day. On a subsequent week-day the maker of the note made an express promise to pay the amount. *Held*, that the payee is entitled to recover against the maker. *Brewster* v. *Banta*, 49 Atl. Rep. 718 (N. J., Sup. Ct.).

Contracts made on Sunday are generally rendered illegal by statute, and the courts commonly refuse all aid to either party. *Block* v. *McMurray*, 56 Miss. 217. Recovery, therefore, in cases like the principal one, is hard to sustain. The new promise cannot be treated as waiving a purely personal defence, for contracts like this are uniformly held void. No subsequent ratification can possibly validate such an agreement. *Reeves* v. *Butcher*, 31 N. J. Law 224. On the other hand, it seems impossible to support action on the new promise without conceding the adequacy of moral consideration. Apart from certain well-defined exceptions which do not cover the principal case, this concession is generally denied, even in New Jersey. *Updike* v. *Titus*, 13 N. J. Eq. 151; see 15 HARV. LAW REV. 73. The principal case represents an existing tendency to avoid the hardship resulting from declaring Sunday contracts void, where something of value has passed between the parties. See *Catlett* v. *Trustees, etc.*, 62 Ind. 365. Substantial justice would, however, be more logically attained by declaring the transaction inoperative to create rights or to pass title, allowing recovery back of anything delivered or paid. Such recovery has been allowed in at least one state. *Tucker* v. *Mowrey*, 12 Mich. 378; see also *Havey* v. *Petrie*, 100 Mich. 190.

CORPORATIONS — LEGAL STATUS OF ENGLISH TRADE UNIONS. — *Held*, that an injunction will lie against a registered trade union in its registered name. *Taff Vale Ry. Co.* v. *Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426. See NOTES, p. 311.

CRIMINAL LAW — LARCENY BY TRICK — FRAUDULENT GAMING. — The prosecuting witness in good faith engaged in a game of cards with the defendant and others. He placed his stake on the table before him, and allowed it to be taken by the confederates of the defendant without protest when he had lost the bet. The game was

won by fraud, and the defendant enticed the prosecuting witness into it and participated in the fraud. *Held*, that the defendant was guilty of larceny. *State* v. *Skilbrick*, 66 Pac. Rep. 53 (Wash.).

This was clearly not ordinary larceny, for the money was taken with the consent of the owner. The question remains whether it was larceny by trick or obtaining property by false pretences. The fundamental distinction between these two is that in the former the owner intends to part with possession only and in the latter to part with both possession and title. *Regina* v. *Solomons*, 17 Cox C. C. 93; *Smith* v. *People*, 53 N. Y. 111. The courts have in terms recognized this distinction, even when they have gone far toward destroying it by straining the facts in sustaining convictions for larceny. *Regina* v. *Russett*, [1892] 2 Q. B. 312; *People* v. *Rae*, 66 Cal. 423. In the principal case it seems clear that the prosecuting witness retained possession of the money till the cards were displayed, and then consented to give up possession and title together. If the distinction is to be maintained this must be held to be obtaining money by false pretences and not larceny.

DAMAGES — CONVERSION — WILFUL AND INNOCENT WRONGDOERS. — The defendant, having wilfully converted goods of the plaintiff, increased their value by his labor. *Held*, that he is liable in trover for the value at the time the action was begun, without deduction for his labor. *Central Coal, etc., Co.* v. *John Henry Shoe Co.*, 63 S. W. Rep. 49 (Ark.).

By way of *dictum* the court says that the measure of damages as against an innocent wrongdoer would be the value of the goods at the time of the original conversion. The rules laid down in the decision and the *dictum* are the same as those of the Civil Law. WOOD, INSTS. CIVIL LAW, 92. The early common law also seems to support them. 2 KENT, COM., 363. The weight of American authority is to the same effect. SEDGWICK, DAMAGES, 88; see also *Woodenware Co.* v. *United States*, 106 U. S. 432. The reason given for the distinction is that it tends to check wilful wrongdoing. The soundness of this appeal to public policy is at least doubtful. The aim of our law in redressing private wrongs would seem properly to be merely to compensate, and not to punish. If the owner receives the value of the goods at the time of the original conversion, with interest, his actual loss at the hands of the wrongdoer is fully recompensed, and at this point the law ought to stop. There is some authority in support of this view and opposed to the distinction drawn in the principal case. *Single* v. *Schneider*, 30 Wis. 570. The question here discussed is to be distinguished from that of exemplary damages.

DEATH BY WRONGFUL ACT — PREMATURE BIRTH NEGLIGENTLY CAUSED. — The defendant's negligence caused the premature birth of a child, and this resulted in the child's death. *Held*, that the defendant is not liable under the usual statute allowing an action for death by wrongful act. *Gorman* v. *Budlong*, 49 Atl. Rep. 704 (R. I.). See NOTES, p. 313.

EQUITY — SPECIFIC PERFORMANCE — ENTIRE CONTRACT FOR THE SALE OF REALTY AND PERSONALTY. — *Held*, that a single contract for the sale of a plantation together with the stock, implements and supplies thereon may be specifically enforced as an entirety. *Brown* v. *Smith*, 109 Fed. Rep. 26 (Cir. Ct., S. C.).

It is well settled that ordinarily a contract for the transfer of a chattel will be specifically enforced only where the chattel to be transferred has some unique, sentimental, or artistic value. *Dowling* v. *Betjemann*, 2 Johns. & Hem. 544. It is equally well settled however as a general principle, that where the plaintiff is entitled to equitable relief and also to legal relief, equity on taking jurisdiction will, to avoid multiplicity of suits, do complete justice, although in doing so it may decree on matters otherwise cognizable only at law. See POM., EQ. JUR. § 181. The contract in the principal case being in part for the conveyance of land, it seems proper for equity to take jurisdiction; and if so it is strictly in accord with equitable principles that specific performance be decreed as to the chattels, in a suit on the whole contract, and that the plaintiff be not forced to sue at law for damages in respect to them. Authority on the point is very meagre; but the cases found apply the same rule as the principal case. *Leach* v. *Fobes*, 77 Mass. 506, 510; *Perin* v. *Megibben*, 53 Fed. Rep. 86, 91.

EQUITY — SPECIFIC PERFORMANCE — INADEQUACY OF CONSIDERATION. — The defendant, having reason to think he could sell a lot of land to X provided he could

convey it with an adjoining strip, contracted to buy the strip from the plaintiff, who, knowing the defendant's position, made the price excessive. X subsequently declined to buy. *Held*, that specific performance, being inequitable, will not be decreed. *Espert* v. *Wilson*, 60 N. E. Rep. 923 (Ill.).

Relief by specific performance of a contract over which equity has jurisdiction, undoubtedly rests on the sound discretion of the court, upon consideration of the circumstances. See *Radcliffe* v. *Warrington*, 12 Ves. Jun. 326, 331. But the exercise of that discretion seems to be regulated by certain broad rules. It is generally said that where the contract imposes great hardship, or where unfair advantage has been taken, equity will not act. See *Seymour* v. *Delancy*, 3 Cow. 445, 505. But where the hardship objected to was foreseeable, and the parties contracted deliberately with open eyes, specific performance has often been granted. *Adams* v. *Weare*, 1 Bro. Ch. 567. Accordingly many cases hold that mere inadequacy of consideration is not sufficient to bar the remedy. *Ready* v. *Noakes*, 29 N. J. Eq. 497. On principle the contracting parties, rather than the court, should be the judges of the value to them of a contract. The position of the court in the principal case, in refusing to enforce what is simply a hard bargain, seems contrary to the modern tendency.

EVIDENCE — CONFESSIONS — PRIVILEGE — ADMISSIBILITY OF TESTIMONY BEFORE GRAND JURY. — *Held*, that the testimony of the accused before a grand jury, which was investigating the crime for which he was subsequently indicted, was properly admitted as evidence against him at the ensuing trial. *Wisdom* v. *State*, 61 S. W. Rep. 926 (Tex., Cr. App.). See NOTES, p. 308.

EVIDENCE — HEARSAY — INTENT. — In a prosecution for attempting to bribe an election judge to sell an official ballot before the election, the defence was that the sole intent of the accused in offering the money was to persuade the judge to produce the ballot, which he had no right to have in his possession at that time, in order that he might be arrested with the ballot in his hands. To prove this intent, the accused proposed to show, by a conversation between the mayor and himself, the plan he was pursuing. *Held*, that such evidence was improperly excluded as hearsay, since the conversations were part of the *res gestæ* and were also competent as declarations of intention. *Banks* v. *State*, 60 N. E. Rep. 1087 (Ind.).

In general, when intention is material, a party's declarations as to his intent, though in their nature hearsay, are admitted according to the best view as an exception to the hearsay rule. *Mutual, etc., Ins. Co.* v. *Hillmon*, 145 U. S. 285; see 7 HARV. LAW REV. 117. Many courts, as in the principal case, place the admission of such evidence on the ground of *res gestæ*. But this term seems properly applicable only to cases of declarations practically simultaneous with the acts charged and explanatory thereof. These are to be distinguished from declarations of intention not simultaneous with the acts in question. *State* v. *Hayward*, 62 Minn. 474, 497. The result in the principal case, however, is sound on the second ground. It is interesting for the very proper decision that not only the language of the declarant himself is admissible, but also the other half of the conversation, which is so intimately connected with the declarations as to be necessary for their proper understanding.

EVIDENCE — JUDGMENT AS LINK IN CHAIN OF TITLE. — The plaintiff in an action of ejectment, in order to deduce title in himself from X, offered in evidence a judgment in a former action of ejectment brought by the plaintiff's predecessor against X, to which the defendant was not a party or privy. A statute made a judgment in ejectment conclusive as to title upon parties and privies. *Held*, that the judgment, though not conclusive against the defendant's right, was admissible as a muniment of title. *Skelly* v. *Jones*, 61 N. Y. App. Div. 173.

When offered in evidence against a stranger, judgments are generally excluded as being *res inter alios acta*. *Trustees of Putnam Free School* v. *Fisher*, 34 Me. 172. But there is apparently an exception in cases where the question adjudicated was that of title as between the parties to the former action, the judgment being, as to that, conclusive upon every one. *Barr* v. *Gratz's Heirs*, 4 Wheat. 213; *Greenleaf* v. *Brooklyn, etc., R. R. Co.*, 132 N. Y. 408. The judgment has, accordingly, the same force as a deed of conveyance executed by the party against whom it was rendered. A judgment in ejectment was not, at common law, conclusive as to title even upon the parties to it. *Smith* v. *Sherwood*, 4 Conn. 276. But in the principal case a statute removes that peculiarity, and places such a judgment within the class above described. The decision, therefore, in admitting the judgment as a muniment of title, seems

sound, and in accordance with authority. The present defendant may still show that his claim is paramount to that established by the judgment, or he may attack the validity of the judgment, just as the validity of a deed may be impeached.

EVIDENCE — MURDER — DECLARATIONS OF AN ACQUITTED CO-CONSPIRATOR. — A and B were jointly indicted for murder, but were tried separately, and A was acquitted. On the trial of B, a conspiracy between A and B to commit the murder having been established, declarations by A before the commission of the crime were admitted. *Held*, that such admission was proper. *Musser* v. *State*, 61 N. E. Rep. 1 (Ind.).

The general rule in prosecutions for conspiracy is that evidence of the acts or declarations of one of the accused persons is admissible against any other, on the ground of common interest. *Clune* v. *United States*, 159 U. S. 590; *Card* v. *State*, 109 Ind. 415. But when one of several alleged conspirators has been acquitted of that crime, his acts and declarations are no longer provable against the others, as his acquittal is regarded as disproving his participation in the common agreement. *Paul* v. *State*, 12 Tex. App. 346. Since in all cases the admission of the testimony depends upon proof of the common agreement, this is clearly correct in a case where the conspiracy is the subject of the investigation. But where, as in the principal case, the chief inquiry is as to another crime, and the conspiracy is but an incident, the acquittal of one defendant, accused as a principal, does not disprove his connection with the others in the preliminary agreement; and if the conspiracy is established, the evidence, which has an obvious bearing on the main inquiry, should still be competent. *Holt* v. *State*, 39 Tex. Cr. Rep. 282, 300. On this ground, therefore, the decision in the principal case is clearly right.

MUNICIPAL CORPORATIONS — UNAUTHORIZED CONTRACTS — EMPLOYMENT OF ADVERTISING AGENT. — The city council of Cape May employed a man to represent the city as an advertising agent and bring before the public the claims of the city as a summer resort. *Held*, that the municipality cannot legally pay his expenses, since the employment of such an agent was unauthorized by its charter. *State* v. *City of Cape May*, 49 Atl. Rep. 584 (N. J., Sup. Ct.).

Since the powers of a municipality are limited to those delegated by its charter, their extent is a subject of construction. The established rule is that the corporation possesses only those powers granted in express words, those necessarily implied in or incidental to the express powers, and those essential to the declared objects and purposes of the corporation. *Ottawa* v. *Carey*, 108 U. S. 110, 121; *Cook County* v. *McCrea*, 93 Ill. 236. The reason for this strict construction is inherent in the nature of such corporations; the power of a majority, even within the limits of the charter, to subject the whole community to taxation and other burdens, against the will of a large minority, is dangerous and requires close restriction. See *Spaulding* v. *Lowell*, 40 Mass. 71, 74. On this ground courts have held municipal acts void which granted money for celebrations, and for expenses of committees opposing legislative measures. *New London* v. *Brainard*, 22 Conn. 553; *Coolidge* v. *Brookline*, 114 Mass. 592. From this point of view, the employment of an agent to advertise a sea-side resort seems clearly outside the ordinary powers of municipal corporations; and since the charter in the principal case contained no special authorization, the decision seems correct.

PROCEDURE — FEDERAL COURTS — REMOVAL OF CAUSES — LOSS OF JURISDICTION. — All the parties to an action were citizens of Kentucky except one defendant, a citizen of Ohio. After removal of the entire case by the latter to the federal court on the ground of a separable controversy within the Act of 1888, ch. 866, sec. 2 (25 U. S. Stat. 434), the suit was discontinued as to him. *Held*, that, the court having no further jurisdiction, the case must be remanded to the state court. *Youtsey* v. *Hoffman*, 108 Fed. Rep. 699 (Cir. Ct., Ky.).

A federal court having once taken jurisdiction, will not be ousted by a change in the citizenship of either party or in the ownership of the subject matter. *Morgan* v. *Morgan*, 2 Wheat. 290; *Glover* v. *Shepperd*, 21 Fed. Rep. 481. So jurisdiction will not be divested by the admission as co-defendant of a citizen of the same state as the plaintiff, nor even by the substitution of such a defendant; nor by the reduction of the amount involved below the statutory limit. *Phelps* v. *Oakes*, 117 U. S. 236; *Hardenbergh* v. *Ray*, 151 U. S. 112; *Hayward* v. *Nordberg*, 85 Fed. Rep. 4. Indeed, the rule is laid down broadly by the most eminent authority that jurisdiction depends upon the circumstances at the beginning, and that having once properly attached, it cannot be divested by subsequent events. *Mollan* v. *Torrance*, 9 Wheat. 537. The

principal case seems clearly opposed to this rule and cannot be distinguished from the cases above cited. Some authority, however, is found in its support. *Texas Transportation Co.* v. *Seeligson*, 122 U. S. 519; *Bane* v. *Keefer*, 66 Fed. Rep. 610. Expediency seems better served by adhering to the general rule, by which delay and expense in the adjudication of suits are avoided.

PROPERTY — EASEMENTS — CHANGE BY PAROL AGREEMENT. — The plaintiffs had a right of way over land of the defendant. In consideration of the latter's opening a new way across the land, they agreed orally that the old way might be closed, and this was accordingly done in a manner obviously intended to be permanent. Afterward the defendant obstructed the new way. *Held*, that the defendant will be enjoined from closing the new way without restoring the old one. *Wright* v. *Willis*, 63 S. W. Rep. 991 (Ky.).

The license to use the new way, like any license to do acts on land of the licensor, was, at law, revocable at any time. *Nichols* v. *Peck*, 70 Conn. 439. But the license given to the servient owner authorized him to do acts on his own land inconsistent with the licensor's easement, and, being acted upon, was irrevocable. *Winter* v. *Brockwell*, 8 East 308. It might be argued that what the defendant received was a license to obstruct the old way only so long as the new way was kept open. If so, the easement might not be permanently lost. See *Hamilton* v. *White*, 5 N. Y. 9. But where, as here, the conduct of the parties indicates a permanent abandonment, this construction seems inapplicable, and the easement is therefore extinguished. See *Dyer* v. *Sanford*, 50 Mass. 395. The license to close the old way was, however, consideration for a parol agreement to give a new way; and this agreement, being removed from the Statute of Frauds by part-performance, is enforceable in equity, by decree ordering a grant, or by injunction. *McManus* v. *Cooke*, L. R. 35 Ch. D. 681. On principle, then, the court should at least have enjoined the obstruction of the new way unconditionally, treating the old way as lost.

PROPERTY — EASEMENTS OF LIGHT AND AIR — HIGHWAYS. — The defendant had obtained permission from the city council to construct a passageway over a street the fee of which was in the city. The plaintiff applied for an injunction on the ground that the structure if completed would deprive his adjoining building of light and air. *Held*, that the injunction should have been granted. *Townsend* v. *Epstein*, 49 Atl. Rep. 629 (Md.). See NOTES, p. 305.

QUASI-CONTRACTS — FRAUD OF VENDEE. — DISAFFIRMANCE OF EXPRESS CONTRACT. — A sale of goods under a contract giving a specified time for payment was fraudulently procured by the purchaser. *Held*, that the vendor may ignore the express contract, and sue in *assumpsit* for goods sold and delivered, before the term of credit has expired. *Crown Cycle Co.* v. *Brown*, 64 Pac. Rep. 451 (Or.).

This decision is in accord with the authorities in New York and Kentucky. *Roth* v. *Palmer*, 27 Barb. 652; *Dietz's Assignee* v. *Sutcliffe*, 80 Ky. 650. On the other side are those in England, Massachusetts, and Illinois. *Ferguson* v. *Carrington*, 9 B. & C. 59; *Allen* v. *Ford*, 19 Pick. 217; *Kellogg & Co.* v. *Turpie*, 93 Ill. 265. The point seems not to have arisen elsewhere. That a fraudulent vendee gets legal title to the goods is shown by the fact that he can give good title to a purchaser for value without notice. The vendor retains merely a right equitable in its nature; but he may disaffirm the entire transaction, and maintain trover for the value of the goods. See BENJ., SALES, 445. Courts denying the quasi-contractual remedy hold that bringing *assumpsit* in any form amounts to an affirmance of the express contract. The correctness of this view seems open to question. See KEENER, QUASI-CONTS., 198. Mere disaffirmance of the express contract without demand does not revest the legal title to the goods in the vendor, but leaves the parties standing on the relation arising out of the delivery of the goods to the vendee. There seems, therefore, no inconsistency in allowing the quasi-contractual action.

SALES — CONDITIONAL SALE — TRANSFER OF SELLER'S CLAIM — TITLE TO CHATTEL. — The defendant's note, given for mules delivered to him, stated that title to the mules was to remain in the seller or order until the note should be paid. The note having matured and been assigned, the seller brings trover for the use of the assignee. *Held*, that since assignment of the note operated to vest in the defendant an unincumbered title to the mules, it was error to direct a verdict for the plaintiff. *Burch* v. *Pedigo*, 39 S. E. Rep. 493 (Ga.).

The question how an assignment of the seller's claim in cases like the present affects the title originally retained for security has been answered by courts in three different ways. One view is that maintained by the plaintiff here, that title remains in the seller, but in trust for his assignee. *McPherson* v. *Acme Lumber Co.*, 70 Miss. 649. A second is that the legal title passes to the assignee. *Esty* v. *Graham*, 46 N. H. 169; *Kimball Co.* v. *Mellon*, 80 Wis. 133, 143. The third, that of the principal case, is without discovered precedent. It is further discredited by the rule established for the analogous cases of chattel mortgages, that the *dominus* of the claim owns the security, either equitably or legally. *Honck* v. *Linn*, 48 Neb. 227; *cf. Ramsdell* v. *Tewksbury*, 73 Me. 197. In both classes of cases the debtor's own agreement precludes him from claiming title until he pays. Whether the legal title passes to the assignee depends on the intention of the parties to the assignment. The interests of both parties would seem to justify a presumption that it does. In the principal case the provision as to title contained in the note points strongly in the same direction. The actual decision, therefore, though based on an erroneous conception, is apparently right.

SALES — FRAUD OF AGENT — ESTOPPEL. — The plaintiff authorized a dock company to deliver the plaintiff's lumber to the orders of one C., the plaintiff's clerk, who had a limited authority to make sales. C. fraudulently obtained transfers into the name of B., a fictitious person, and then in the character of B. sold the lumber to the defendant, who took without notice of the fraud. The plaintiff brings an action for conversion. *Held*, that since the plaintiff enabled C. to hold himself out as the owner of the goods, he cannot recover. *Farquharson Bros. & Co.* v. *King & Co.*, 49 W. Rep. 673 (C. A.).

The plaintiff did not give C. the apparent ownership which was relied on by the defendant to his detriment, and though he may have been negligent as to his own interests, it cannot be said that a man owes a duty to others to make it impossible for his agent to rob him. Similar reasoning to that in the principal case would enable every salesman in a shop to pass clear title by estoppel to goods stolen from his employer. Several cases were cited to support the principal decision, but though they contained statements broad enough, these were not necessary to the decisions. Certainly the mere fact of giving another person power to commit fraud is not sufficient to raise an estoppel against the person giving the power. *Cole* v. *North Western Bank*, L. R. 10 C. P. 354; *Johnson* v. *Credit Lyonnais Co.*, 3 C. P. D. 32. Nor does the additional fact that the authority given was intended to be relied upon by others, estop the giver when such authority is exceeded. *Swan* v. *North British, etc., Co.*, 2 H. & C. 175. The decision of the principal case, therefore, seems wrong. *Cf. Lamb* v. *Attenborough*, 1 B. & S. 831.

STATUTE OF LIMITATIONS — PART PAYMENT — APPLICATION OF PAYMENTS. — An agent for collection held three notes signed by the defendant, two as maker and one as surety. There was an understanding that any payment made by the defendant on the obligation as surety should also be credited on the notes made by him, the payee of these notes being the principal for whom he stood as surety on the third note. After action on the notes made by the defendant had become barred by the Statute of Limitations, the defendant made a payment, which the agent indorsed on the note on which the defendant was surety, and also on the other two notes. *Held*, that this was such part payment as would take the two notes out of the statute, and that recovery may be had on them. *Hopper* v. *Hopper*, 39 S. E. Rep. 366 (S. C.).

Where a creditor having several claims against a debtor receives a general payment, he may apply it as he pleases, even towards part payment of claims barred by the statute, whether or not the payment exceeds the amount of the enforceable claims. *Mayor, etc., v. Patten*, 4 Cranch 317; *Mills* v. *Fowkes*, 5 Bing. N. C. 455; *contra, Bancroft* v. *Dumas*, 21 Vt. 456. But part payment, to toll the statute, should constitute an acknowledgment of the debt and imply a promise to pay the residue. *Tippets* v. *Heane*, 1 C. M. & R. 252. Therefore application of a general payment without the debtor's knowledge or consent should not suffice to take a claim out of the statute, as such application cannot identify the payment as one made by the debtor on this specific claim. *Pond* v. *Williams*, 1 Gray 630; *Miller* v. *Cinnamon*, 168 Ill. 447. A provision in the South Carolina statute, making part payment equivalent to a promise in writing, does not affect the point raised, as "part payment" in that provision must mean a payment by the debtor on account of the claim sued on. Nothing in the peculiar facts of the principal case justifies the inference that the payment made was

in fact an acknowledgment of the outlawed claims; and failing this there should be no recovery.

SURETYSHIP — NOTE OF CORPORATION — LIABILITY OF STOCKHOLDERS. — By a California statute each stockholder in a corporation is individually liable for the debts and liabilities of the corporation in proportion to the amount of stock he owns. A note given by a corporation was paid by a surety, who then sought to enforce the stockholders' liability. *Held*, that he can recover only from those who were stockholders when he paid the note. *Yule* v. *Bishop*, 65 Pac. Rep. 1094 (Cal., Sup. Ct.).

As is said in the opinion, the statutory liability of a stockholder for the corporate debts arises at the same time as the liability of the corporation. *Larrabee* v. *Baldwin*, 35 Cal. 155; *Hunt* v. *Ward*, 99 Cal. 612. Consequently only those who owned stock at the time the corporation incurred liability to the plaintiff can be held. The question then is when the liability of a principal to his surety arises. A promise by the principal to indemnify the surety is implied as soon as the surety is bound, and the liability of the principal therefore arises at once. *Appleton* v. *Bascom*, 44 Mass. 169; *Elwood* v. *Deifendorf*, 5 Barb. 398. Moreover it is generally held that a surety who has not had to pay at the time of a conveyance of land by his principal is sufficiently a creditor within the Statute of Elizabeth to have the conveyance set aside subsequently as fraudulent. *Williams* v. *Banks*, 11 Md. 198; but see *Williams* v. *Tipton*, 5 Humph. 66. See also *Taylor* v. *Heriot*, 4 Desauss. 227. It seems, therefore, that those who were stockholders at the time the corporation gave the note were the proper persons to be charged, and that the case is wrongly decided.

TELEPHONE COMPANIES — DISCRIMINATION — MANDAMUS. — *Held*, that where a telephone company unreasonably refuses to supply all applicants with similar facilities without discrimination, it may be compelled to do so by *mandamus*. *State* v. *Citizens' Telephone Co.*, 39 S. E. Rep. 257 (S. C.). See NOTES, p. 309.

TORTS — RECOVERY FOR DAMAGES RESULTING FROM NERVOUS SHOCK. — The plaintiff suffered a miscarriage as a result of fright caused by the negligence of the defendant's servant. *Held*, that she can recover for injuries resulting from the miscarriage. *Dulieu* v. *White*, [1901] 2 K. B. 669. See NOTES, p. 304.

WILLS — RESIDUARY LEGACY — EXEMPTION FROM LIABILITY FOR DEBTS. — A testatrix made a residuary legacy to her executrix. By a separate memorandum, not referred to in the will, but signed by the testatrix, and acknowledged by the executrix to create a valid trust, a certain part of the residue was directed to be held in trust for third persons. The remainder of the residue was insufficient to pay the debts of the testatrix. *Held*, that the debts are payable ratably from both portions of the residue. *In re Maddock*, [1901] 2 Ch. 372.

If in a will a clear intent is shown to exempt personal property from its primary liability for debts, this intent will prevail. *Bootle* v. *Blundell*, 19 Ves. 494 *b*. A specific legacy is held to indicate such intent. But in the principal case the property in question was not the subject of a specific legacy, for it passed under the residuary clause, and though the trust was specific, this arose outside the will. See *Cullen* v. *Attorney-General*, L. R. 1 H. L. 190, 198. The will therefore shows no intent to exempt the property. On the other hand the memorandum of the trust seems in itself insufficient to create an exemption. The legatee is bound by it, since it would be fraud to keep for himself property which was given him on the understanding that it would be held for others. *Norris* v. *Frazer*, L. R. 15 Eq. 318. But there seems no ground for holding that the duties of the executrix as such in paying debts are affected by a paper which is not testamentary nor incorporated in the will by reference. The decision in the principal case, therefore, appears to be correct. *Cf. Cullen* v. *Attorney-General*, *supra.*